Public Lands News

Bulletin # 13: Oct. 24, 2011

Dear Subscriber:
This bulletin from Public Lands News newsletter reports on the following:

*** FS ROADLESS RULE ENDORSED AGAIN; WILL WYOMING SEEK TO OVERTURN?**

NOTE: This bulletin is a supplement to your regular edition of Public Lands News. It is NOT your regular issue. The next issue will be published October 28.
The Editors

Second appeals court validates FS roadless area rule

In a landmark ruling the Tenth U.S. Circuit Court of Appeals October 21 endorsed a 2001 Clinton administration Forest Service roadless area rule, perhaps ending a decade of debate about the rule's validity.

The ruling effectively orders the Forest Service to protect 49 million acres of roadless forest from road construction and timber harvest. An Idaho-specific rule exempts an additional 9.5 million acres from the Clinton rule.

Loose ends remain. The plaintiff in the case, the State of Wyoming, still has a couple of legal weapons, such as a possible appeal to the full Tenth Circuit and an appeal to the U.S. Supreme Court.

In addition there are unresolved roadless policy issues in three states. In Idaho environmentalists have sued to undo the Idaho exemption rule. In Colorado the Forest Service has proposed a Colorado-only rule. And in Alaska a federal court order included the Tongass National Forest in the national rule against the wishes of the state.

For now the Obama administration is giving every indication it will stick with the Clinton rule. "We applaud this decision upholding the 2001 rule and are proud to have vigorously supported the rule in this case," said the Forest Service in a statement

In the October 21 decision a three-judge panel of the Tenth Circuit agreed with the Ninth U.S. Circuit Court of Appeals on the legality of the Clinton rule, in so doing reversing a Wyoming District Court decision. The disagreement between the Ninth Circuit and U.S. District Court Judge Clarence Brimmer in Wyoming had confused the legal responsibility of the Forest Service in managing roadless areas.

Public Land News is published by Resources Publishing Co.,
P.O. Box 41320 • Arlington, VA 22204
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Into that gap stepped Secretary of Agriculture Tom Vilsack in May of 2009. He issued a directive that gives him authority to review all proposed projects in 49 million acres of roadless areas.

Vilsack had also said that if federal courts couldn't resolve their differences about roadless areas, the Forest Service would write a new rule. Now that the Tenth Circuit has ruled the Vilsack memo may be mooted.

Environmentalists and their allies in Congress celebrated. Rep. Edward Markey (D-Mass.), ranking minority member of the House Natural Resources Committee, said the Tenth Circuit decision should validate the Clinton rule. "This decision by the courts should be the end of the road for those trying to pave some of the last remaining roadless forests in America," he said.

House Natural Resources Committee Chairman Doc Hastings (R-Wash.) indicated he and his fellow western Republicans are not giving up their attacks on the rule. "For over a decade, the Clinton Roadless Rule has locked up millions of acres of land from the American people and today the Obama Administration continues to employ this job destroying policy," said Hastings. "Our public lands are intended to be multiple use and the Committee will continue to work to keep them open and accessible to all Americans for both recreation and job creation."

Western Republicans have introduced major bills (HR 1581 and S 1087) to revoke the Clinton rule. The lead sponsors are House Majority Whip Kevin McCarthy (R-Calif.) and Sen. John Barrasso (R-Wyo.)

Sen. Lisa Murkowski (R-Alaska), ranking minority member on the Senate Energy Committee, agreed on a need to revoke the Clinton rule. "This decision will further strangle the economic opportunities in Southeast Alaska and throughout the West," she said. "Congress may need to intercede to put America back on track to a more balanced and rational approach for managing our federal lands."

Although environmentalists celebrated, they were still not satisfied with the Idaho rule. "The Tenth Circuit's decision greatly helps to clarify and solidify the nationwide protections provided by the Roadless Rule," said Mike Anderson, a senior resource analyst in The Wilderness Society's Seattle office. "We still have a ways to go to restore protection for roadless areas in Idaho, which the Bush administration exempted from the rule. We will continue our efforts to ensure full protection of all roadless areas."

Joel Webster, director of the Theodore Roosevelt Center for Western Lands, called the Tenth Circuit decision "a real victory for hunters and anglers." When pressed for uses that hunters and fishermen most feared in roadless areas, he cited oil and gas development.

"A lot of oil and gas development is done with directional drilling from outside (the protected area)," he said. "That's the responsible way. It preserves surface values but still allows reasonable extraction. It costs more but that's the price of preserving the back-country."

THREE LOOSE ENDS:

* THE IDAHO SITUATION: The State of Idaho successfully petitioned the Forest Service for an Idaho-only rule. The Forest Service approved it Oct. 16, 2008. The Idaho rule governs management of 9.3 million acres of roadless national forest in the state, while allowing development on another 400,000 roadless acres. On January 29 Idaho District Court Chief Judge William Winmill rejected a lawsuit from environmentalists against the Idaho rule.

* THE COLORADO SITUATION: The State of Colorado and the Forest Service formally proposed April 15 a Colorado-only roadless area rule. The state has unsuccessfully proposed Colorado-only rules for five years.

The new Colorado plan would protect 4.18 million acres of the 14.5 million acres of national forest within the state. Exceptions from bans on development include 20,000 acres to complement existing coal mining operations, unspecified acreage for thinning operations near the urban interface and unspecified acreage for water projects.

* THE ALASKA SITUATION: In a March 4 decision U.S. District Court Judge John W. Sedwick in Alaska ordered the Tongass National Forest included in the national rule protecting roadless areas. The Bush administration in 2003 issued an Alaska-specific rule that exempted the 16.8 million-acre Tongass from the 2001 Clinton rule.

WHAT THE TENTH CIRCUIT SAID: The massive, 121-page Tenth Circuit decision of October 21 rejected the July 14, 2003, decision of Judge Brimmer that the Clinton rule violated The Wilderness Act, the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA) and the Multiple Use Sustained Yield Act (MUSYA).

Of the MUYSA the court said simply that the Forest Service adequately evaluated the impact of the rule on other uses. Of NFMA the court said the rule was not governed by NFMA because the rule was not issued under that law.

The court devoted much of its decision (67 pages) to explaining why the 2001 rule complied with NEPA. For one thing the court said the outcome of the rule making was not preordained before an EIS was prepared.

"Accordingly, because the record does not contain sufficient evidence to show that the Forest Service irreversibly and irretrievably committed itself to a certain outcome before the NEPA analysis was completed, and because the Forest Service otherwise complied with the mandates of NEPA, we conclude that the Forest Service indeed took a 'hard look' at the environmental consequences of the Roadless Rule and therefore did not act arbitrarily and capriciously in conducting its NEPA analysis," said the court.

As for specific requirements of NEPA the court said the Forest Service did an adequate job of evaluating cumulative impacts of the roadless rule, a transportation policy and a road management rule. The court said the Forest Service was only required to analyze "reasonably foreseeable" impacts.

"Therefore, although the Forest Service was right to disclose the coordinated rulemakings and acknowledge that they could have some cumulative impacts — i.e., that they likely would result in an overall decrease in road construction and an increase in unroaded areas in the NFS — it was required to include only impacts that were reasonably foreseeable," said the court.

The Tenth Circuit also attacked one of Judge Brimmer's more controversial assertions, if not the most controversial assertion – that the Clinton roadless rule constituted administrative designation of wilderness. Brimmer held that was in contravention of The Wilderness Act, which gives designation power exclusively to Congress.

The circuit court said the Forest Service did not actually designate wilderness because inventoried roadless areas (IRAs) included in the rule are quite different than wilderness areas.

"However, a comparison of the provisions of the Wilderness Act and the Roadless Rule demonstrates that IRAs and wilderness areas are not functionally equivalent or

'essentially the same,'" said the Tenth Circuit. "To the contrary, the two types of areas are distinct. In fact, such a comparison demonstrates that the scope of the Wilderness Act is broader than the scope of the Roadless Rule; that is, the Wilderness Act is more restrictive and prohibitive than the Roadless Rule."

The Tenth Circuit concluded in strong language that Judge Brimmer erred in issuing a nationwide injunction to block the Clinton rule. "As discussed above, (the plaintiff) Wyoming failed to demonstrate that the Forest Service's promulgation of the Roadless Rule violated the Wilderness Act, NEPA, MUSYA, or NFMA. Thus, the district court abused its discretion in permanently enjoining the Roadless Rule on a nationwide basis because the court's action was based on the erroneous legal conclusion that Wyoming had succeeded on the merits of its claims."

The decision is available at the Tenth Circuit website http://www.ca10.uscourts.gov/clerk/opinions.php and is titled there as 09-8075. The decision is cited as *State of Wyoming v. USDA Nos. 08-8061 & Biodiversity Conservation Alliance, 09-8075 of October 21, 2011.*

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